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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

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In re C.P. et al., Persons Coming Under  
the Juvenile Court Law.

EL DORADO COUNTY DEPARTMENT OF HUMAN  
SERVICES,

Plaintiff and Respondent,

v.

JESSICA C. et al.,

Defendants and Appellants.

C050842

(Super. Ct. No. 20040032)

Jessica C. and Brad P. (appellants), the mother and father of C. and Z. (the minors), each appeal from orders of the juvenile court terminating the parental rights of appellants. (Welf. & Inst. Code, §§ 366.26, 395.)<sup>1</sup> Jessica contends the

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<sup>1</sup> Undesignated statutory references are to the Welfare and Institutions Code.

juvenile court abused its discretion in denying her petition for modification (§ 388), and appellants claim the evidence was insufficient to support the court's finding that it was likely the minors would be adopted. Disagreeing with each of these contentions, we affirm.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

On August 16, 2004, the El Dorado County Department of Human Services (DHS) filed an original juvenile dependency petition pursuant to section 300 on behalf of the minors. The petition alleged appellants had histories of substance abuse that rendered them incapable of providing adequate care for the minors. The juvenile court sustained the petition, adjudged the minors dependent children, and granted appellants reunification services.

The minors were placed with their paternal grandmother and her husband. Visits between appellants and the minors were scheduled on a weekly basis, with DHS supervision. However, appellants were not permitted to attend visits when they failed to drug test.

On May 4, 2005, the juvenile court terminated reunification services. Visitation for father was modified to once monthly; mother's visitation remained as previously ordered. Appellants were permitted telephone contact with the minors on a twice-weekly basis. Thereafter, DHS recommended adoption as the permanent plan for the minors.

According to the social worker's report prepared for the section 366.26 hearing, the minors were doing well in the home of the paternal grandparents, who wanted to adopt the minors. The minors were healthy and presented no behavior problems. The social worker believed both minors would benefit from the permanence and stability afforded by adoption.

On July 15, 2005, Jessica filed a petition for modification pursuant to section 388, seeking an additional period of reunification services. In that petition, Jessica alleged she had continued to receive various services, and maintained contact with the minors. Jessica also averred the minors were "bonded and attached" to her. In support of her petition, Jessica attached documents evidencing the efforts she had made. The juvenile court granted appellant an evidentiary hearing on the petition.

Clinical psychologist Eugene Roeder conducted a psychological evaluation to determine whether the minors were adoptable or if they were so bonded to their grandparents that it would be detrimental to the minors to place them in an adoptive home. The minors' grandparents had told Roeder they no longer wished to adopt the minors. Instead, they wanted to act as traditional grandparents, without parenting responsibilities.

Roeder concluded the minors were adoptable children. Acknowledging the bond existing between the minors and their grandparents, Roeder opined that removal of the minors from their custody would not be detrimental to the well-being of the

minors. Roeder also stated C.'s transition to a new adoptive placement would be "substantially more difficult" than would Z.'s, but that C. was capable of forming new attachments with prospective adoptive parents.

DHS continued to believe the minors were likely to be adopted. According to a social worker's report, DHS had received "several home studies of families" for consideration as prospective adoptive parents of the minors. Although no adoptive family had been identified, DHS opined that there would be no difficulty in finding one.

At the September 13, 2005 hearing on the petition for modification and for determination of a permanent plan for the minors, Jessica testified she was continuing to participate in programs. Jessica admitted that on June 6, 2005, she had used illegal drugs, but stated she had not used since then. Admitting she had first used methamphetamine at age 14, 22-year-old Jessica also testified that on four other occasions she had maintained sobriety for 90 days.

The paternal grandmother testified she had supervised visits between the minors and Jessica. According to the grandmother, those visits went well. She also told the juvenile court that C. was attached to Jessica, and that she believed severance of his relationship with Jessica would cause C. trauma.

In denying Jessica's petition for modification, the juvenile court found she had demonstrated changing, rather than

changed, circumstances. The court also determined that granting the modification petition would not promote the best interests of the minors. Thereafter, over the objections of appellants, the juvenile court terminated their parental rights after finding it likely the minors would be adopted.

## **DISCUSSION**

### **I**

Jessica claims the juvenile court abused its discretion in denying her petition for modification. Alleging she had demonstrated changed circumstances, Jessica also asserts the minors would benefit if the court granted the petition because of the bonded relationship existing between the minors and Jessica. Jessica suggests that, under these circumstances, the factors contained in *In re Kimberly F.* (1997) 56 Cal.App.4th 519 (*Kimberly F.*), pertaining to a determination whether to grant the petition, were satisfied.

Section 388, subdivision (a) provides that the parent of a dependent child may petition the juvenile court "upon grounds of change of circumstance or new evidence . . . for a hearing to change, modify, or set aside any order of court previously made . . . ." Section 388 permits modification of a dependency order if a change of circumstance or new evidence is shown and if the proposed modification is in the best interests of the minor. (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 526.)

When a petition for modification is brought after the termination of reunification efforts, the best interests of the

child are the paramount consideration. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) In assessing the best interests of the child at this stage of the proceedings, the juvenile court looks to the child's needs for permanence and stability. (*Ibid.*)

The party petitioning for modification has the burden of proof by a preponderance of the evidence. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 48.) A modification petition "is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.)

In denying Jessica's petition for modification, the juvenile court stated it was "not convinced it's in the best interest of these minors to be returned to [Jessica] or that the renewal of services be initiated . . . ." The court recognized that Jessica had made efforts to ameliorate the difficulties underlying the dependency petition. However, expressing concern about Jessica's history and circumstances, the court opined that the best interests of the minors would be promoted by proceeding to the selection of a permanent plan for them.

The determination by the juvenile court was well within its discretion. As the record reflects, Jessica had made some progress, and her efforts are to be commended. But the record also suggests more time lay ahead for Jessica in which she would continue to participate in programs. In the meantime, it was

likely the minors would continue to develop and attach to adult figures.

In her petition, Jessica averred it was in the best interests of the minors for the juvenile court to provide Jessica with additional services because of the bond they shared and due to Jessica's efforts. But, as the record reflects, the minors had been developing outside Jessica's custody for many months and were capable of bonding with adult caregivers.

The difficulty with Jessica's petition and attached documents is her failure to allege pertinent facts in support of her belief that the minors' best interests required eventual reunification with Jessica. A prima facie showing requires the proffering of facts relevant to the claim made. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) Mere beliefs, without facts to support them, do not constitute prima facie evidence of the minors' best interests.

Here, it is not enough to suggest, as Jessica does, that her modification petition should be granted because Jessica had improved her situation and because she and the minors were bonded to one another. At the time of the hearing on the modification petition, the minors had been out of Jessica's custody for a substantial period of time. Moreover, at least at one time the minors' caregivers expressed a willingness to adopt the minors. Jessica's petition, therefore, is deficient because it contains few if any facts relating to the minors' current circumstances.

Jessica's brief emphasizes her efforts to maintain their relationship, her visits with the minors, her ties to the minors, and her participation in services in support of her claim that reunification with the minors was in the latter's best interests, but Jessica says little about the minors' circumstances and feelings, nor about the possibility that, even after modification in the form of additional services, she might not be able to achieve reunification with the minors. (Cf. *In re Ramone R.* (2005) 132 Cal.App.4th 1339, 1348-1349.)

Most importantly, Jessica did not allege any facts that the minors' needs for permanence and stability would be promoted by an extended period of reunification or return to a parent who had been unable to demonstrate only months before that the programs in which she participated had resulted in sufficient changes in her behavior to permit the minors to reside with her safely.

In *Kimberly F.*, *supra*, 56 Cal.App.4th at pages 526-532, the appellate court warned against the juvenile court simply comparing the situation of the natural parent with that of a caretaker in determining a section 388 petition. It termed such an approach the "'simple best interest test.'" (*Kimberly F.*, *supra*, at p. 529.) Instead, the appellate court found that determining a child's best interests under section 388 required an evaluation of a number of factors, including the seriousness of the reason for the dependency action, the existing bond between parent and child and caretaker and child, and the nature



of the changed circumstances. (*Kimberly F.*, *supra*, at pp. 529-532.) The court suggested it was unlikely a parent who lost custody because of a drug problem could prevail on a section 388 petition, whereas in a "dirty house" case, which was present in *Kimberly F.*, the chances of success were greater. (*Kimberly F.*, *supra*, at pp. 531, fn. 9, 532.) In *Kimberly F.*, the court concluded the decision to deny the section 388 petition was based largely and improperly on the juvenile court judge's adoption of the "'narcissistic personality' rationale," which the judge had applied to the mother in that case. (*Kimberly F.*, *supra*, at p. 533; *id.* at pp. 526-527.)

In this case, in denying the section 388 petition, the juvenile court discussed explicitly the factors analyzed in *Kimberly F.*, *supra*, 56 Cal.App.4th 519. Moreover, evidence of all of the critical factors contained in *Kimberly F.*, including the basis of the dependency action, the relationship between Jessica and the minors, and the nature of the changed circumstances, was before the court. Moreover, the court considered evidence contained in the social worker's report about the contact between Jessica and the minors that was favorable to Jessica. Finally, the court's extensive comments about the case suggests it considered carefully all pertinent circumstances. On the record before it, the court concluded that Jessica failed to sustain her burden. Under the abuse of discretion standard, we see no error in that determination.

The juvenile court was required by statute (§ 388) to focus on the minors' best interests in deciding whether to grant the petition for modification. As we have seen, those interests consist of the minors' needs for stability and permanence. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Childhood cannot wait for a parent to establish readiness for parenting. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) Here, the minors had shown the apparent ability to bond with adult figures. On the other hand, Jessica was still working on the problems that had contributed to the dependency proceedings. On this record, it is not surprising that the court ruled the minors should not be forced to wait any longer.

Under the circumstances of this case, the juvenile court did not act arbitrarily, capriciously, or beyond the bounds of reason in denying Jessica's petition for modification. The court's implicit conclusion that the minors' needs for permanency compelled denial of the petition and served the minors' best interests was reasonable and is supported by the record. (Cf. *In re Edward H.*, *supra*, 43 Cal.App.4th at p. 594.) In sum, Jessica failed to make the necessary showing, as required by section 388, that a modification might promote the best interests of the minors. (Compare *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1416 with *In re Heather P.* (1989) 209 Cal.App.3d 886, 891.) There was no abuse of discretion or other error in the court's decision. (Cf. *In re Daijah T.* (2000) 83 Cal.App.4th 666, 673-675.)

## II

Appellants contend the orders of the juvenile court terminating their parental rights must be reversed because there is no substantial evidence supporting the court's finding that it was likely the minors would be adopted. According to appellants, the record contains no evidence of the existence of prospective adoptive families for the minors. Moreover, Brad argues, the minors must remain together as a sibling group, and their strong attachment to their grandparents made their adoptability problematical. Finally, Jessica claims she established a statutory exception to adoption based on the bond existing between the minors and herself.

When the sufficiency of the evidence to support a finding is challenged on appeal, even where the standard of proof in the trial court is clear and convincing evidence, we must determine if there is any substantial evidence -- that is, evidence that is reasonable, credible and of solid value -- to support the conclusion of the trier of fact. (*In re Angelia P.* (1981) 28 Cal.3d 908, 924; *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.) In making this determination, we resolve all conflicts in favor of the prevailing party. Issues of fact and credibility are questions for the trier of fact, and we do not reweigh the evidence when assessing its sufficiency. (*In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 318-319; *In re Jason L.*, *supra*, at p. 1214; *In re Steve W.* (1990) 217 Cal.App.3d 10, 16.)

Determination of whether a child is likely to be adopted focuses first upon the characteristics of the child. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) The existence or suitability of the prospective adoptive family, if any, is not relevant to this issue. (*Ibid.*; *In re Scott M.* (1993) 13 Cal.App.4th 839, 844.) "However, there must be convincing evidence of the likelihood that adoption will take place within a reasonable time." (*In re Brian P.* (2002) 99 Cal.App.4th 616, 624.) Certainly, the fact that there is a prospective adoptive family willing to adopt the minor constitutes evidence that the minor is likely to be adopted by that family or some other family within a reasonable period of time. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.)

In this case, the record reflects the minors were developing at a normal rate. Moreover, the psychologist concluded both were capable of forming attachments to adult caregivers. DHS also reported the minors had bonded with their grandparents. Based on this evidence, the juvenile court reasonably could find, as it did, that the minors were likely to be adopted. (*In re Roderick U.* (1993) 14 Cal.App.4th 1543, 1550.)

As we have seen, it is not necessary that the minor already be in a potential adoptive home, or that there even be a prospective adoptive parent. (*In re Sarah M.*, *supra*, 22 Cal.App.4th at p. 1649.) In *In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1205, cited by Brad, the adoptability finding

was based on the willingness of the mother's former boyfriend to adopt the minor. Here, although no prospective adoptive homes had been approved for placement, several home studies had been submitted. In any event, the lack of adoptive homes does not preclude a finding that the minors were likely to be adopted. (*In re Sarah M.*, *supra*, at p. 1649.) Moreover, the prospect that the minors may have some continuing behavioral problems also did not foreclose a finding of adoptability as to both minors. (*In re Jennilee T.* (1992) 3 Cal.App.4th 212, 224.)

In *In re Tamneisha S.* (1997) 58 Cal.App.4th 798, the social services agency was unable, after a 10-month search, to locate an adoptive home for the child. (*Id.* at pp. 802-803.) Ultimately, the juvenile court granted a guardianship after finding the agency had failed to show the minor was likely to be adopted. (*Id.* at p. 803.) The Court of Appeal affirmed the order of guardianship. (*Id.* at p. 808.)

This case is different procedurally from the circumstances found in *In re Tamneisha S.* Here, as we have seen, home studies were available. Moreover, the record suggests the minors have the ability to form attachments with caregivers. This fact suggests the adoptability of the minors does not depend on the willingness of a particular current foster parent or other adult caregiver to adopt them. Finally, the record reflects each

minor has improved and there is no evidence they will not continue to do so.<sup>2</sup>

It is true, as Brad states, that the minors, especially C., were bonded strongly to their grandparents, and that C. had had some behavioral problems, especially when he was out of the custody of his grandparents. It also is true that Dr. Roeder's assessment did not suggest the transition of the minors into a prospective adoptive placement would be an easy one. In fact, Roeder opined C.'s adjustment would be "substantially more difficult" than Z.'s.

But contrary to Brad's suggestion, the bulk of the evidence contained in the record does not suggest that placing the minors in an adoptive setting would be detrimental to the minors. After examining him, Roeder found C. was capable of forming attachments, and opined that Z. would easily transition into a new adoptive home. Moreover, the long-term prognosis for both minors was a positive one. Other than the grandmother's testimony, no evidence to the contrary was adduced at the section 366.26 hearing.

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<sup>2</sup> In her reply brief, Jessica relies primarily on *In re Ramone R.*, *supra*, 132 Cal.App.4th 1339, for the proposition that the juvenile court must explore the full range of placement options for some problematical minors. The minor there engaged in extremely difficult behaviors, including head-banging and feces-smearing. (*Id.* at pp. 1351-1352.) Here, however, no similar evidence of such problematical behaviors was present as to either minor.

Arguing termination of parental rights would be detrimental to the minors, due to their relationship with her, Jessica claims a guardianship would have promoted the best interests of the minors better than adoption. She relies on section 366.26, subdivision (c)(1)(A).

One of the circumstances under which termination of parental rights would be detrimental to the minor is: "The parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(A).) The benefit to the child must promote "the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

The parent has the burden of establishing the existence of any circumstances that constitute an exception to termination of parental rights. (*In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1372-1373.) The juvenile court is not required to find that termination of parental rights will not be detrimental due to specified circumstances. (*Id.* at p. 1373.) Even frequent and

loving contact is not sufficient to establish the benefit exception absent significant, positive, emotional attachment between parent and child. (*In re Teneka W.* (1995) 37 Cal.App.4th 721, 728-729; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.)

Section 366.26 requires both a showing of regular contact and a separate showing that the child actually would benefit from continuing the relationship. *In re Autumn H.*, *supra*, 27 Cal.App.4th 567, interprets the statutory exception to involve a balancing test, and both *In re Autumn H.* and *In re Beatrice M.*, *supra*, 29 Cal.App.4th 1411, posit a high level of parental-type involvement and attachment. Even assuming those decisions overemphasized the importance of the parental role, the record here does not support Jessica's suggestion that the minors would benefit from continuing their relationship with her simply because of Jessica's regular visits with them and due to the attachment existing between them. (Cf. *In re Amanda D.* (1997) 55 Cal.App.4th 813, 821-822.)

After it became apparent that Jessica would not reunify with the minors, the juvenile court had to find an "exceptional situation existed to forego adoption." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) In this case, on the contrary, the court determined impliedly that the minors would not benefit from continuing their relationship with Jessica to such a degree that termination of parental rights would be detrimental to them. Jessica had the burden to demonstrate the statutory



exception applied. We conclude that Jessica failed to make such a showing. Therefore, the court did not err in terminating parental rights. (*In re Amanda D.*, *supra*, 55 Cal.App.4th at pp. 821-822.)

C. and Z. comprise a young, bonded sibling group. They are healthy and developmentally on track. All evidence in the record, with the exception of the grandmother's testimony, supported the proposition that the minors were likely to be adopted. In sum, substantial evidence supports the juvenile court's determination that the minors were likely to be adopted. (*In re Scott M.*, *supra*, 13 Cal.App.4th at pp. 843-844.)

#### **DISPOSITION**

The orders of the juvenile court terminating the parental rights of appellants are affirmed.

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CANTIL-SAKAUYE, J.

We concur:

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MORRISON, Acting P.J.

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HULL, J.